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No. 95-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS
Petitioners

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent

and

UNITED STATES OF AMERICA,
Intervenor-Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, The Becket Fund respectfully submits this brief *amicus curiae* in support of Respondents.[1] The Becket Fund is a bipartisan and ecumenical

[1]All parties have consented to the filing of this brief. The Petitioner and Respondent Flores have previously filed a letter of consent with the Clerk. A letter of consent from the United States has been filed

(continued...)

public-interest law firm that protects the free expression of all religious traditions. We are, for example, currently representing Catholics, Protestants, Mormons, Jews, Muslims and Buddhists in a variety of cases.[1] Some involve the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, at issue here. Our brief addresses the issue of *stare decisis* in the context of the original understanding of Section 5 of the Fourteenth Amendment. In particular, we challenge the view of original understanding put forward by the Clarendon Foundation in its brief *amicus curiae* in support of Petitioner. Accordingly, we believe our brief will complement, and not duplicate, the briefs of the parties and thus assist the Court in resolving the case.

SUMMARY OF ARGUMENT

Petitioner's *amicus*, the Clarendon Foundation, urges this Court to overrule *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and thus invalidate RFRA, on the basis of Clarendon's proffered original understanding of Section 5 of the Fourteenth Amendment. This argument is flawed for two reasons. First, it fails to give sufficient weight to the principle of *stare decisis*. And second, it misreads the original understanding.

Although the Court and individual Justices have enunciated many different versions of *stare decisis*, three basic points emerge: (1) Respect for precedent is, at a minimum, "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). (2)

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[1](...continued)
simultaneously with this brief.

Any "detours from the straight path of *stare decisis* . . . have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). And (3) "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

Katzenbach and its progeny, and the construction of Section 5 they embody, present just such a rule of law on which both legislatures and citizenry have relied. Overruling it now in order to invalidate RFRA would uproot much legislation at great social cost. Accordingly, the principle of *stare decisis* requires that such a drastic step be taken only for a demonstrably grave reason.

The only reason proffered by the Clarendon Brief, a mistaken version of the history of Section 5, is inadequate. The Clarendon argument focuses principally on two pieces of history: the Bingham draft of the Fourteenth Amendment, which was not passed in its original form, and the debates over the Civil Rights Act of 1871, especially § 2, now codified principally at 42 U.S.C. § 1985(3) (1994). Neither proves Clarendon's point.

The Bingham draft provided that

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of

> citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

Contrary to Clarendon's claim, the Bingham draft, while criticized, was never flatly rejected or even tabled. It was instead postponed. Cong. Globe 39th Cong., 1st Sess. 1095 (1866). Moreover, the opposition to the Bingham draft was more complex than Clarendon realizes. Some opponents criticized it for doing too much--giving Congress too much authority. Others criticized it for doing too little--relying exclusively on Congressional action. But neither side criticized it merely for authorizing prophylactic legislation such as RFRA to protect a right already contained in the Fourteenth Amendment.

Similarly, the debate over § 2 of the Civil Rights Act of 1871 makes clear that the original understanding of Section 5 permitted legislation that went beyond judicial enforcement of the Fourteenth Amendment. Indeed § 2 explicitly reached private conspiracies. And while § 2 has been upheld by this Court under the Thirteenth Amendment in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), it was originally debated under Section 5 of the Fourteenth Amendment. Whatever this may say about the constitutional competence of the drafters of § 2, it is compelling evidence that the original understanding of the Fourteenth Amendment was at least as broad (and probably broader) than that expressed in *Katzenbach*.

In short, the history of Section 5 demonstrates that the original understanding provides no basis for departing from *stare decisis*, overruling *Katzenbach* and its progeny, and invalidating RFRA.

Finally, and alternatively, should the Court disagree and invalidate RFRA, it should provide the district court on remand with guidance on the Free Exercise claim still pending before it. In particular, it should give that court guidance on the continuing validity of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), much as the separate opinions in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994), questioned the continuing validity of *Aguilar v. Felton*, 473 U.S. 402 (1985).

ARGUMENT

The Clarendon Foundation, writing in support of petitioner, has asked this Court to overrule *Katzenbach v. Morgan*, 384 U.S. 541 (1966), in whole or in part. Brief of Clarendon Foundation as *Amicus Curiae* in Support of Petitioner ("Clarendon Brief") at 5-21. This drastic step is required, it says, by an originalist reading of Section 5. With respect, we disagree. As demonstrated below, the original understanding of Section 5 was at least as broad as the construction this Court has placed on it. More to the point, it in no way required departing from the principle of *stare decisis*, reconsidering *Katzenbach*, and invalidating RFRA.

I. THE DOCTRINE OF *STARE DECISIS* COUNSELS GREAT CAUTION IN RECONSIDERING *KATZENBACH V. MORGAN*

This Court and its individual Justices have taken a variety of approaches to the principle of *stare decisis* in constitutional adjudication.[2] The present case does not require the Court to

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[2]Some Justices have held to a relatively weak rule of *stare decisis*. For example, Justice Scalia wrote in *South Carolina v. Gathers*, 490 U.S.

(continued...)

settle on any one of these versions. There is sufficient consensus on three basic points to resolve the issue at hand.

First, respect for precedent is, at a minimum, "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). It is, in Justice Harlan's words, the basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970). It allows the citizenry to "have confidence that the rules on which they rely in ordering their affairs . . . are rules of law." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Thus, the principal of following the

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[2](...continued)
805, 825 (1989), that "[w]ith some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible," *stare decisis* has little place in constitutional decisions. Justice Douglas likewise believed that "[t]he place of *stare decisis* in constitutional law" was "tenuous," and stressed that "above all else . . . it is the Constitution which [a Justice swears] to support and defend, not the gloss which is his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

Other Justices have stated a more robust rule. Justice Stevens articulated a relatively strict standard in *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983); *see also Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). *See also* Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990). Other Justices who have taken positions along this spectrum include Justice Goldberg, *Equal Justice 4* (1971); Justice (then-Solicitor General) Reed, *Stare Decisis and Constitutional Law*, 35 Pa. B.A.Q. 131 (1938), and Justice Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944).

rules of cases already decided "is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). It protects "the settled practices and expectations of a democratic society." *Payne*, 501 U.S. at 835 (Scalia, J., concurring). *Stare decisis*, in short, requires that precedent normally be respected.

The second point follows from the first. "[A]ny detours from the straight path of *stare decisis* . . . have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). Thus, "even in constitutional cases, the doctrine carries such persuasive force that . . . departure from precedent [must] be supported by some 'special justification.'" *Payne*, 501 U.S. at 842 (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

Third, and finally,

> *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.

Hilton, 502 U.S. at 202. *See also, Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme . .

. where reliance interests are involved").[3]

For the reasons set forth in Respondent Flores' brief, *Katzenbach* and its progeny, and the construction of Section 5 they embody, present just such a rule of law. Overruling this established law now in order to invalidate RFRA would uproot much legislation at great social cost. Accordingly, the principle of *stare decisis* requires that such a drastic step be taken only for a demonstrably grave reason. The only reason proffered by the Clarendon Brief is an idiosyncratic version of the legislative history of Section 5. As we demonstrate below, Clarendon's reading of history is insufficient to require this Court to depart

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[3] Thus, the Court has refused to overrule even palpably erroneous precedent that has become embedded in the law. In *Davis v. Department of Labor*, 317 U.S. 249 (1942), the Court limited, but did not overrule, *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). *Jensen* had held that the Constitution's grant of admiralty and maritime jurisdiction to federal courts prevented a state from requiring compensation of a longshoreman injured on the gangplank of a docked ship. *Davis* then upheld an award under Washington law to the widow of a worker who drowned in a navigable river. It did so by creating a "twilight zone," in which employees could recover under either federal or state law. 317 U.S. at 256.

Concurring in *Davis*, Justice Frankfurter thought that *Jensen* should be overruled, but declined to do so because:

> Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. Federal and State enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being.

317 U.S. at 259 (Frankfurter, J., concurring). *See also Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

from *stare decisis,* re-examine *Katzenbach*, and strike down RFRA.

II. THE ORIGINAL UNDERSTANDING OF SECTION 5 WAS AT LEAST AS BROAD AS *KATZENBACH'S*

The Clarendon Foundation argues that precedent should be abandoned in favor of what it claims was the original understanding of Section 5.

Its argument focuses principally on two pieces of history: the Bingham draft of the Fourteenth Amendment, which was not passed in its original form, and the debates over the Civil Rights Act of 1871, especially § 2, now codified principally at 42 U.S.C. § 1985(3) (1994). Neither proves Clarendon's point.

A. The Bingham Draft

The Bingham draft of the Fourteenth Amendment was solely a grant of power to Congress:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

Clarendon claims (1) that this draft was flatly rejected, (2) that it was rejected because it gave Congress too much power, and (3) that RFRA assumes the power denied to Congress when the draft was rejected. Each step in this argument has serious

problems. The last is the most problematic of all.

1. As an initial matter, it is not even clear that the Bingham draft was flatly rejected. It was sharply criticized, but not formally voted down. The Clarendon Brief states that "The House . . . voted 110 to 37 to table Bingham's proposal," Clarendon Br. at 8. But this is not so. The motion to table, which would have effectively killed the amendment, was *defeated* by a vote of 110 to 41. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). A motion to postpone, which kept the amendment alive, was then passed by 110-37. *Id.*[4]

2. There was indeed serious opposition to the Bingham draft. But the story line is not as simple as the Clarendon Brief's telling of it. The opposition to the Bingham draft came from multiple directions. Some said it did too much, others that it did too little. It was said to do too much because it lacked a state action requirement, and opponents feared that it would enable unlimited federal legislation. *See infra.* It did too little because its effect would have depended wholly on *Congressional* action, and when the southern states were readmitted, any implementing legislation would be vulnerable to repeal. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss). Thus, immediately before the vote, Rep. Hotchkiss said that on the critical issue of insulation from

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[4] Debating this history in 1871, Rep. Farnsworth claimed that Republicans defeated the motion to table solely out of party loyalty. He thought that the motion to postpone was intended to have a similar effect. Cong. Globe, 42d Cong., 1st Sess. app. 115 (1871). But Bingham denied that, and argued that he subsequently proposed a *stronger* draft instead, which became the Fourteenth Amendment. *Id.* Suffice it to say that the Clarendon Brief exaggerates the fate of the Bingham draft, which was postponed and not tabled.

future political change, the draft was too weak: "I think the gentlemen from Ohio [MR. BINGHAM] is not sufficiently radical in his views upon this subject." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). Rep. Conkling responded that he would vote to postpone "for very different reasons from, if not entirely opposite to, those [Rep. Hotchkiss] has just given." *Id.* Ultimately Bingham himself concluded that it did too little. Because it did not expressly mention states, he feared that courts would follow the reasoning of *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), and construe the amendment not to limit state action at all. Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871).

In short, even if the Bingham amendment was postponed for lack of support, it is impossible to say with certainty *whose* lack of support caused its postponement. Criticism came from both directions--and, in the end, from Bingham himself.

3. But even assuming that the postponement of the Bingham amendment was a defeat, and even assuming that it was defeated solely for the reasons the Clarendon Brief suggests, that still would not justify Clarendon's conclusion that *Katzenbach* and RFRA improperly resurrect the Bingham draft. The critics cited by Clarendon did not argue that Congress should be deprived of *all* power to make prophylactic rules to protect life, liberty, or property. Rather, they argued that the Bingham draft went too far and conferred on Congress plenary power to legislate on all subjects. That, they feared, would have converted the United States from a government of limited and delegated powers to a government of general ones. Thus, Senator Stewart said that the only way to implement the Bingham draft:

> would be for Congress *to legislate fully upon all subjects* affecting life, liberty, and property, and in

> this way to secure uniformity and equal protection to all persons in the several States.

Id. at 1082 (quoted at Clarendon Br. 7) (emphasis added). And Rep. Hotchkiss argued that the amendment would "authorize Congress *to establish uniform laws* throughout the United States upon . . . the protection of life, liberty, and property." *Id.* at 1095 (quoted at Clarendon Br. 8).

RFRA does no such thing. It is not an example of unbridled federal legislation concerning things proper to the States. It is, instead, an example of the Congress legislating to protect a right this Court has held to be incorporated in the Fourteenth Amendment itself.

B. The Debate Over The Civil Rights Act of 1871

The Clarendon Brief makes similar arguments based on the retrospective 1871 debate over what the Bingham draft had meant and how the Fourteenth Amendment ultimately differed from it. These arguments do not prove Clarendon's point, either.

1. The issue in the debate was whether Congress had power to enact § 2 of the Civil Rights Act of 1871 (now codified at 42 U.S.C. § 1985(3)). Rep. Garfield took the occasion to emphasize the importance of the Fourteenth Amendment's state action requirement:

> The [Fourteenth Amendment] exerts its force *directly upon the States*, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear *directly upon the citizens* . . . .

Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871) (quoted in Clarendon Br. at 11) (emphasis added). That would have been too much. The possible scope of "life, liberty and property" is vast, and opponents feared that a power to regulate individuals for the protection of life, liberty, and property would be a general legislative power. Thus, he continued:

> [The Bingham draft] contained a clear grant of *power to Congress to legislate directly* for the protection of life, liberty, and property within the States. . . . [It] gave Congress *plenary power to cover the whole subject* with its jurisdiction . . . to the exclusion of the State authorities.

Id. (quoted in Clarendon Br. at 11) (emphasis added). By contrast, "The [Fourteenth Amendment] *limited but did not oust* the jurisdiction of the State over these subjects." *Id.* (quoted in Clarendon Br. at 11) (emphasis added).

But, once again, RFRA does exactly what Garfield said the Fourteenth Amendment authorized, and it does *not* do what Clarendon's favorite critics feared the Bingham draft would have done. RFRA "limit[s] but [does] not oust the jurisdiction of the State." Consistently with RFRA, states can pursue any policy and regulate in any field, subject only to the limit that substantial burdens on religious practice must be justified. RFRA enforces "restrictions and limitations upon [State] power." But it does *not* enact "uniform laws" in the states; it does *not* "legislate fully upon all subjects;" it does *not* "bear directly upon the citizens." Rather, it "exerts its force directly upon the states" by limiting state law.

2. The Clarendon Brief is as instructive for what it does *not* say about the 1871 debates as for what it does say. While relying heavily on the debates over the Civil Rights Act that

year, it nevertheless does not reveal the outcome of those debates. The omission is telling, for the outcome ultimately refutes Clarendon's position. That outcome was a statute--passed with the support of the critics Clarendon quotes--that itself reached even private conspiracies. We do not suggest that Section 5 should be interpreted to authorize legislation reaching purely private conduct. We merely point out that the original understanding of Section 5 was considerably more exuberant than Clarendon thinks.

The speeches quoted by Clarendon were directed at a bill, introduced by Rep. Shellabarger, that could be interpreted to apply to almost any crime or tort committed by two or more people.[5] Rep. Farnsworth argued that because the mere requirement of two or more persons had no constitutional significance, the proposal really assumed the power to enact

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[5] The Bill provided:

> That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof, shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court.

Cong. Globe, 42d Cong., 1st Sess. app. 113 (1871).

general federal criminal law in the States. Cong. Globe, 42d Cong., 1st Sess. app. 113 (1871). Rep. Willard agreed. He contended that the original bill "gave to the United States courts jurisdiction of every criminal offense that could be committed anywhere within the limits of the United States." *Id.* at 188.

Of course, those objections fit perfectly with similar objections raised to the earlier Bingham draft of the Amendment itself, and that is why Clarendon quotes them. Farnsworth and Garfield argued that the Bingham draft had been rejected solely because it would have conferred on Congress a general legislative power. They contended the Shellabarger bill should be rejected for much the same reason--it assumed such a power existed.

But those criticisms were not the end of the matter. On April 5, Shellabarger offered a new draft that responded to the objections. *Id.* at 477. The point of the revision was to exclude ordinary crimes and torts, to disclaim any general power of legislation, and to focus on particular crimes and torts that were closely connected to constitutional rights. The key insertion was to require that the conspiracy have "the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The civil version of this language is now codified in 42 U.S.C. § 1985(3) (1994); the entire original provision is set out in *Kush v. Rutledge*, 460 U.S. 719, 727-29 (1983).

Significantly, the new language still did not confine the statute to any judicially enforceable meaning of the Fourteenth Amendment. The statute plainly applies to private conspiracies, although the Amendment on its face applies only to state action. True, the private conspiracies had to be specifically directed to the equal enjoyment of Fourteenth

Amendment rights. Ordinary crimes and torts, motivated by greed, malice, or random violence, were not included. And the general power to legislate was disclaimed, while a connection to the Fourteenth Amendment was emphasized. But the fact remains that the bill reached private conspiracies--and enjoyed the support of Farnsworth, Garfield, Willard, and the other moderate Republican critics. Cong. Globe, 42d Cong., 1st Sess. 522 (1871).

The Clarendon Brief quotes Farnsworth as follows: "If [the Fourteenth Amendment] requires 'enforcing' legislation, what kind does it require? Certainly not a law which goes *a long way* beyond the scope of the provision." *Id.* app. 117 (quoted in Clarendon Br. at 13) (emphasis added). The subsequent history of the bill shows that Farnsworth meant exactly what he said: enforcement legislation could, in his view, go "beyond the scope of the provision," but it could not go "a long way beyond." Congress could deal with private conspiracies even though the Amendment did not reach them, but any such legislation had to maintain a close nexus with the Amendment; it could not spread into a general power to legislate in the states. Whatever this may say about Farnsworth's grounding in constitutional theory,[6] it is compelling evidence that the original understanding of Section 5 was not what Clarendon thinks it was.

This legislative history is of course familiar to this Court. The Court reviewed it in *Griffin v. Breckenridge*, 403 U.S. 88, 99-102 (1971), and the unanimous Court read it exactly as we have read it:

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[6] This Court, of course, eventually upheld § 2 as applied to private conspiracies under the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). The debates, however, took place in the context of Section 5 of the Fourteenth Amendment.

> The enormous sweep of the original language led to pressures for amendment, in the course of which the present civil remedy was added. The explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private conspiracies.
> . . .
>
> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Id. at 100, 102.[7]

In short, the legislative history relied on by Clarendon supports our position, not theirs. It is consistent with long established precedent upholding prophylactic enforcement legislation that goes beyond judicial enforcement of the Fourteenth Amendment. Most importantly, and at a minimum, it shows that Petitioner and its *amicus* have fallen far short of showing that the original understanding requires a wholesale

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[7] This view of the legislative history is also summarized and reaffirmed in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69 (1993), and unanimously in *Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983). The Court in *Kush* notes that "the legislative history is discussed accurately and persuasively" in *McCord v. Bailey*, 636 F.2d 606, 615-17 (D.C. Cir. 1980), an opinion that reviews the legislative history in some detail and is fully consistent with *Griffin* and the view set out here. *Kush*, 460 U.S. at 707 n.10.

overruling of precedent.

III. IF THIS COURT DOES NOT UPHOLD RFRA IT SHOULD GIVE THE DISTRICT COURT, ON REMAND, GUIDANCE ON THE CONTINUING VIABILITY OF *EMPLOYMENT DIVISION V. SMITH*

In *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994), five Justices of this Court questioned the validity of *Aguilar v. Felton*, 473 U.S. 402 (1985). Justice O'Connor wrote that the Court should be "prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to . . . impartiality, not animosity, towards religion." 114 S. Ct. at 2498. Justice Kennedy agreed: "it may be necessary for us to reconsider [*Aguilar*] at a later date". *Id.* at 2505. *See also id.* at 2515 (Scalia, J., dissenting) (joined by Rehnquist, C.J., and Thomas, J.).

Just as *Felton* gave rise to *Kiryas Joel*, so too *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), gives rise to the present case.[8]

For the reasons set forth above, amicus believes that RFRA is constitutional under *Katzenbach* and its progeny, and the rule of law that these cases embody should not be disturbed. But should this Court disagree and depart from *stare decisis* to overrule *Katzenbach* and strike down RFRA, then this case would necessarily be remanded to the district court for a decision on the Free Exercise and property rights claims still

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[8] *Cf.* WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1. ("unnatural deeds do breed unnatural troubles").

pending there. In that eventuality, we respectfully urge this Court to apply to *Smith* the same standard of *stare decisis* it applies to *Katzenbach* and give the district court guidance on *Smith's* continuing validity in much the same manner as the *Kiryas Joel* Court commented on *Aguilar*.[9]

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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[9]It is not unheard of for a lower court to refuse to follow a precedent that has subsequently been undermined, and then to have its decision affirmed by this Court. The most recent example is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where this Court affirmed a decision by the United States Court of Appeals for the Third Circuit that had upheld restrictions on abortion that this Court had explicitly ruled unconstitutional in earlier cases. *Compare Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-51 and 439-442 (1983) (striking down, *inter alia*, statute requiring 24-hour waiting period for abortions and parental consent requirement for minor) *with Casey*, 947 F.2d 682, 706-707 and 707-709 (upholding, *inter alia*, 24-hour waiting period and parental consent requirement for minors).

Perhaps the most famous example is this Court's affirmance of the refusal of the District Court in *Barnette v. West Virginia State Board of Ed.*, 47 F. Supp. 251 (S.D.W.Va. 1942), *aff'd*, 319 U.S. 624 (1943), to follow *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), which had been handed down only two years earlier. In *Gobitis*, this Court had held that a school in Pennsylvania *could* force Jehovah's Witness children to salute the American flag, even though it violated their religious beliefs. Two years later, the District Court in *Barnette* refused to follow *Gobitis*. The District Court noted that two of the Justices from the *Gobitis* majority were no longer on the Court, and that in a decision subsequent to *Gobitis*, *Jones v. Opelika*, 316 U.S. 584, 598 (1942), the Court seemed reluctant to draw on *Gobitis*. See 47 F. Supp. at 253. This Court, of course, agreed with the District Court and affirmed.

Respectfully submitted,

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